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Labor Law, Antitrust Law, and Economics Professors' Comment on the National Labor Relations Board's Proposed Joint-Employer Rule

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Submitted via www.regulations.gov

John F. Ring, Chairman
National Labor Relations Board
1015 Half Street, SE
Washington, D.C. 20570-0001

Attn: Roxanne Rothschild, Associate Executive Secretary, NLRB

Re: Notice of Proposed Rulemaking (NPRM), *The Standard for Determining Joint-Employer Status*, 83 Fed. Reg. 46681 (Sept. 14, 2018), Docket Number: 2018-19930; RIN 3142-AA13

Dear Chairman Ring,

We write as professors in the fields of labor law, antitrust law, and labor economics with extensive expertise in: (1) the National Labor Relations Act ("NLRA"), National Labor Relations Board and judicial decisions as they pertain to joint employment; (2) the history and differential application of the antitrust laws to workers over employers; (3) antitrust law as it pertains to employer market power; (4) economic theory pertaining to employer market power and monopsonistic competition in labor markets; and/or (5) empirical economic research on labor market concentration and the impact of employer market power and monopsonistic competition on workers' wages and terms and conditions of work.

On September 14, 2018, the National Labor Relations Board (the "Board") published the Standard for Determining Joint-Employer Status Rule, proposing a new definition of "joint employers" (the "NPRM"). The NPRM proposed that an employer be considered a "joint employer" of a "separate employer's employees only if the two employers share or codetermine the employees' essential terms and conditions of employment, such as hiring, firing, discipline, supervision, and direction." (p. 46686, col. 2, ¶1). The NPRM requires that a "putative joint employer must possess and actually exercise substantial direct and immediate control over the employees' essential terms and conditions of employment in a manner that is not limited and routine." (*Id.*).

The NLRA capaciously defines "employer" to include "any person acting as an agent of an employer, directly or indirectly," and "employee" to include "any employee, and shall not be limited to the employees of a particular employer."[1] Likewise, the *Restatement (Second) of Agency*'s definition of "servant" under Section 220(1) is broad, including anyone "employed to perform services in the affairs of another and who with respect to the

[1] 29 U.S.C. §§ 151(2)-(3).

physical conduct in the performance of the services is subject to the other's control or right to control."[2] The rule proposed in this Comment is aimed at fulfilling the purposes of the NLRA and agency law principles in their expansive definitions of "employer" and "employee."

We recommend that the Board withdraw the proposed rule to let the existing *Browning-Ferris* "joint employer" definition, recently affirmed by the U.S. Court of Appeals for the D.C. Circuit, stand,[3] or, in the alternative, expand the definition of "joint employer" to explicitly include indirect employers with sufficient market power in the direct employer's product market or the relevant labor market to determine workers' wages and/or terms and conditions of work ("indirect employers") under Section 2(2) of the NLRA. Evidence of existing labor market conditions and indirect employers' collusion and coordination supports this recommendation. Broader workplace restructuring, increasing labor market concentration, employer market power in a range of industries, and employer wage-fixing, collusion, and use of anti-competitive agreements—no-poaching, non-compete, and others—allow indirect employers to determine the terms and conditions of work of other employers' employees. At the very least, the Board should expand the definition of "joint employer" in its proposed rule to franchisors that include no-poaching, non-compete, and similar clauses in franchise agreements: such blatant restrictions on labor market competition that limit worker earnings, mobility and wage discovery should clearly require a finding of joint-employer status.[4]

Indirect employers' exploitation of their market power in labor markets has broader social welfare consequences resulting in: artificially suppressed wages, reduced hiring, decreased labor market dynamism, and broader labor market failures (Section 1). By failing to anticipate and assess the consequences of excluding such indirect employers, the Board has failed to engage in reasoned decision-making (Section 2). It has also failed to minimize any significant economic impact on small businesses and labor unions directly affected by abuses of indirect employers' market power (Section 3). In doing so, the NPRM frustrates the NLRA's purposes of ensuring: (1) equal bargaining power between employees and those who determine their wages and working conditions; and (2) competitive wage rates determined through bargaining between workers with "full freedom of association [and] actual liberty of contract" and "employers who are organized in the corporate or other forms of ownership association" (Section 4).[5] Further, the NPRM conflicts with: (1) existing administrative law requirements of assessing the costs and benefits of its labor market regulation; and (2) Executive Order 13,725 ("Steps to Increase Competition and

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[2] *Restatement (Second) of Agency* § 220(l) ("A servant is a person employed to perform services in the affairs of another and who with respect to the physical conduct in the performance of the services is subject to the other's control or right to control.").

[3] *Browning-Ferris Indus. of Cal., Inc.*, 362 NLRB No. 186, at 2 (2015), *aff'd in relevant part*, *Browning-Ferris Indus. of Cal., Inc. v. NLRB*, No. 16-1028, 2018 U.S. App. LEXIS 36706 (D.C. Cir. Dec. 28, 2018), defined "joint employers" of the same statutory employees as those who "share or codetermine those matters governing the essential terms and conditions of employment," and did not require that a statutory employer's control "be exercised directly and immediately"—"[i]f otherwise sufficient, control exercised indirectly—such as through an intermediary—may establish joint-employer status."

[4] *See* Alan B. Krueger & Orley C. Ashenfelter, *Theory and Evidence on Employer Collusion in the Franchise Sector* (NBER Working Paper No. 24831, July 2018), *available at* https://www.nber.org/papers/ w24831.

[5] National Labor Relations Act ("NLRA"), 29 U.S.C. § 151.

Better Inform Consumers and Workers to Support Continued Growth of the American Economy"), which requires agencies to use their authorities to promote competitive labor markets (Section 5). Thus, we recommend that the Board withdraw its NPRM or expand its definition of "joint employers" to include indirect employers with sufficient market power to determine the wages and working conditions of other employers' employees (Section 6). Either alternative would fulfill the NLRA's purposes (Section 7) and would not conflict with existing federal law and rules (Section 8).

1. **Labor market concentration, increased employer market power, and anticompetitive conduct allows indirect employers to engage in wage-setting of other employers' employees.**

Through workplace "fissuring" and employment restructuring, firms have outsourced employment in a range of contractual arrangements for labor inputs: franchising, subcontracting, and other supply-chain agreements.[6] This restructuring more easily allows indirect employers to convert traditional wage-setting that would have occurred internal to their firms to contractual *pricing* arrangements—containing direct and indirect mechanisms of control and supervision—with other, direct employers.[7] One of the consequences of this shift is that indirect employers can use contractual arrangements to more easily engage in "wage discrimination" by removing pay for labor inputs from in-firm, single-wage policies constrained by internal labor market wage-setting (determined by seniority-based pay, internal equity, and other constraints) into pricing for labor inputs on the external market.[8] This reduces indirect employers' labor costs. First, as increasing empirical evidence shows, indirect employees suffer wage penalties resulting from indirect employers' contractual wage-setting for labor inputs.[9] Second, indirect employers have shifted liability for social insurance benefits (unemployment insurance, workers' compensation premiums) and private benefits (insurance, retirement) to direct employers while retaining the benefit of the labor inputs those other employers provide at lower rates.[10] Third, indirect employers reduce labor costs by minimizing exposure to liability from workplace injuries, illnesses and fatalities as well as for discrimination, harassment

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[6] *See generally* DAVID WEIL, THE FISSURED WORKPLACE 93-177 (2014).
[7] *Id.* at 76-77.
[8] WEIL, *supra* note 6, at 40-41, 87-88. *See also* Deborah Goldschmidt & Johannes F. Schmieder, *The Rise of Domestic Outsourcing and the Evolution of the German Wage Structure*, 132 Q. J. ECON. 1165, 1165-1217 (2017); Arindrajit Dube & Ethan Kaplan, *Does Outsourcing Reduce Wages in the Low-Wage Service Occupations? Evidence from Janitors and Guards*, 63 INDUS. LAB. REL. REV. 287 (2010) (finding a "wage penalty" of four to seven percent for janitors working as contractors as opposed to working directly for an employer); Samuel Berlinski, *Wages and Contracting Out: Does the Law of One Price Hold?*, 46 BRIT. J. INDUS. REL. 59 (2008) (finding that janitors who worked as contractors earned fifteen percent less than those working in-house).
[9] *See, e.g.*, Goldschmidt & Schmieder, *supra* note 8; Berlinksi, *supra* note 8; Dube & Kaplan, *supra* note 8; Matthew Dey, Susan Houseman & Ann Polivka, *What Do We Know About Contracting Out in the United States? Evidence from Household and Establishment Surveys*, *in* LABOR IN THE NEW ECONOMY 267-304 (eds. Katherine G. Abraham, James R. Speltzer & Michael Harper, 2010); Katherine G. Abraham & Susan K. Taylor, *Firms' Use of Outside Contractors: Theory and Evidence*, 14 J. LAB. ECON. 394, 394-424 (1996).
[10] WEIL, *supra* note 6, at 77.

and unjust dismissal.[11] Fourth, indirect employers can avoid costs associated with unionization and compliance with the NLRA with regard to non-union workforces due to the National Labor Relations Board's failure to recognize most indirect employers as "employers" under the NLRA.[12] These avoided costs include those associated with administering collective bargaining agreements as well as overall lower pricing for labor inputs set at a non-union premium wage.[13] These effects of workplace fissuring allow firms to exploit market power they already have as a result of exogenous shocks to and inherent frictions within the labor market.[14] And they can reduce these costs without losing substantial indirect control and supervision over the provision of labor inputs.

In addition to workplace "fissuring" and employment restructuring, indirect employers exploit changes in labor market conditions, engage in labor market abuses to artificially suppress wages for labor inputs, and use wage-setting contractual arrangements to determine direct employers' labor costs, thus directly impacting those employers' costs and revenue. Labor market concentration, increased indirect employer market power, and evidence of employer collusion through wage-fixing, no-poaching, non-compete, and other types of indirect-direct employer arrangements allow indirect employers to engage in wage-setting that reduces workers' wages.

Labor Market Concentration. Increased labor market concentration facilitates indirect employers ability to engage in wage-setting for labor inputs.[15] Rising corporate

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[11] WEIL, *supra* note 6, at 78; DAVID MICHAELS, OCCUPATIONAL SAFETY & HEALTH ADMIN. ("OSHA"), ADDING INEQUALITY TO INJURY: THE COSTS OF FAILING TO PROTECT WORKERS ON THE JOB 11 (June 2015), https://www.osha.gov/Publications/inequality_michaels_june2015.pdf.

[12] *See, generally*, Craig Becker, *Labor Law Outside the Employment Relationship*, 74 TEX. L. REV. 1527, 1528-30 (1996).

[13] *See, e.g.*, *id.* Indirect employers' market power can prevent pass-on of the costs of other employers' union premium wage or can exert direct or indirect pressure on other employers to avoid or suppress unionization.

[14] For a broader discussion of monopsony as "the best simple model to describe the decision problem facing an individual employer," *see* ALAN MANNING, MONOPSONY IN MOTION: IMPERFECT COMPETITION IN LABOR MARKETS 1-27 (2003); JOAN ROBINSON, THE ECONOMICS OF IMPERFECT COMPETITION (1933); Lloyd G. Reynolds, *The Supply of Labor to the Firm*, 60 Q. J. ECON. 390, 390-411 (1946). Important labor market frictions include labor market fragmentation, search frictions, job differentiation, lock-in effects, and worker development of firm-specific skills. For literature discussing these labor market frictions, *see, e.g., id.*; David E. Card, Ana Rute Cardoso, Jeorg Heining & Patrick Kline, *Firms and Labor Market Inequality: Evidence and Some Theory*, 36 J. LAB. ECON. S13 (2018); Eduardo M. Azevedo, *Imperfect Competition in Two-Sided Matching Markets*, 83 GAMES & ECON. BEHAVIOR 207, 207-223(2014); Pierre Cahuc, Fabien Postel-Vinay & Jean-Marc Robin, *Wage Bargaining with On-the-Job Search: Theory and Evidence*, 74 ECONOMETRICA 323, 364 (2006); Richard Rogerson, Robert Shimer & Randall Wright, *Search-theoretic Models of the Labor Market: A Survey*, 43 J. ECON. LIT. 959, 959-88 (2005); Kenneth Burdett & Dale Mortensen, *Wage Differentials, Employer Size, and Unemployment*, 39 INT'L ECON. REV. 257, 257-73 (1998); Kenneth Burdett, *A Theory of Employee Job Search and Quit Rates*, 68 AMER. ECON. REV. 212, 212-220 (1978); J.J. McCall, *Economics of Information and Job Search*, 84 Q J. ECON. 113, 133-26 (1970); George Stigler, *The Economics of Information*, 69 J. POL. ECON. 213, 213-225 (1961).

[15] For empirical evidence of the impact of increased labor market concentration on wages, *see*, *e.g.*, Kevin Rinz, U.S. CENSUS BUREAU, *Labor Market Concentration, Earnings Inequality, and Earnings Mobility* (CARRA Working Paper Series, Working Paper No. 2018-10, 2018); Brad Hershbein & Claudia Macaluso, *Labor Market Concentration and the Demand for Skills* (Working Paper, July 30, 2018), *available at* http://conference.iza.org/conference_files/DATA_2018/macaluso_c26795.pdf; Brad Hershbein, Claudia Macaluso & Chen Yeh, *Concentration in U.S. Labor Markets: Evidence From Vacancy and Employment Data* (Working Paper, 2018), *available at* https://www.dropbox.com/s/jsvohr58igf4813/

concentration can impact labor markets by expanding each individual firm's market power, facilitating collusion, and increasing barriers to entry.[16] Labor market dynamism, or the frequency of changes in who is working for whom, has also been in a pattern of long-term decline, suggesting that incumbents are shielded from competitive upward pressure on wages and an increase in job-switching costs for non-contingent or non-temporary workers.[17] In a number of industries, companies indirectly contracting for labor inputs—lead companies—operate in more concentrated markets than the direct employer-companies they contract.[18] Industries with larger increases in concentration exhibit a larger decline in labor's share of GDP, and the small number of "superstar" firms like Apple, Microsoft, and Google exhibit lower labor share than non-"superstar" firms.[19] Concentration has meant that not only are workers ultimately supplying their labor inputs to a smaller number of end-user employers but also that intermediary firms that directly employ labor inputs are being squeezed by a smaller number of firms with whom they contract for the provision of labor services.[20]

Increased Employer Market Power. Indirect employers can engage in wage-setting for labor inputs from direct employers based on their exercise of market power over those employers. In a truly competitive labor market in an economic sense, firms hiring or contracting for labor inputs face a flat supply curve.[21] If a firm bids too low for labor inputs, workers would find alternative employment, so competitive firms would all need to pay market wages and compensation would equalize across similarly productive workers for

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HMY_concentration.pdf?dl=0; Efraim Benmelech, Nittai Bergman, & Hyunseob Kim, *Strong Employers and Weak Employees: How Does Employer Concentration Affect Wages?* (NBER Working Paper No. 24307, Jan. 2018), https://www.nber.org/papers/w24307; Peter C. Fisk, *Study Measures Effect of Labor Market Concentration on Wages*, Monthly Labor Review, Bureau of Labor Statistics (July 2018), *available at* https://www.bls.gov/opub/mlr/2018/beyond-bls/study-measures-effect-of-labor-market-concentration-on-wages.htm; José Azar, Ioana Marinescu, Marshall Steinbaum, & Bledi Taska, *Concentration in U.S. Labor Markets: Evidence from Online Vacancy Data* (NBER Working Paper No. 24395, 2018); José Azar, Ioana Marinescu & Marshall Steinbaum, *Labor Market Concentration* (NBER Working Paper No. 24147, 2017); Douglas Webber, *Firm Market Power and the Earnings Distribution*, 35 LAB. ECON. 123, 123-134 (2015).

[16] COUNCIL OF ECON. ADVISERS, LABOR MARKET MONOPSONY: TRENDS, CONSEQUENCES, AND POLICY RESPONSES 2-4 (Oct. 2016) [hereinafter CEA I], https://obamawhitehouse.archives.gov/sites/default/files/page/files/20161025_monopsony_labor_mrkt_cea.pdf; Azar et al., *supra* note 13 (showing that going from the 25th percentile to the 75th percentile in concentration is associated with a 15-25% decline in posted wages, suggesting that concentration increases labor market power); Suresh Naidu, Eric A. Posner & E. Glen Weyl, *Antitrust Remedies for Labor Market Power*, 132 HARV. L. REV. 536 (2018); *see also supra* note 8 (collecting literature on wage penalties in fissured labor markets).

[17] *Id.* at 10–12; Raven Molloy et al., *Understanding Declining Fluidity in the U.S. Labor Market*, *in* BROOKINGS PAPERS ON ECON. ACTIVITY 183, 183–88 (2016); Henry Hyatt & James Spletzer, *The Shifting Job Tenure Distribution*, 41 LAB. ECON. 363, 363-77 (2016); Steven J. Davis & John Haltiwanger, *Labor Market Fluidity and Economic Performance* 1–3 (Nat'l Bureau of Econ. Research, Working Paper No. 20479, 2014).

[18] David Autor, David Dorn, Lawrence F. Katz, Christina Patterson & John Van Reenen, *Concentrating on the Fall of the Labor Share*, 107 AM. ECON. REV. 180, 180-186 (2017); Matthew Kehrig & Nicolas Vincent, *Growing Productivity without Growing Wages: The Micro-Level Anatomy of the Aggregate Labor Share Decline,* CESifo Working Paper Series 6454 (2017).

[19] *Id.*

[20] WEIL, *supra* note 6, at 79-92.

[21] MANNING, *supra* note 14, at 29-32.

similar types of jobs.[22] But there is an emerging consensus within the economic literature that labor markets are naturally monopsonistically competitive, meaning that due to a range of exogenous factors and labor market frictions, most firms face upward-sloping labor supply curves.[23] Indirect employers can enhance their market power over labor inputs through a range of contractual and other mechanisms, whether in direct contracting for labor or indirect contracting with intermediary firms for labor inputs, which means that they will hire less labor and pay lower wages than the otherwise equivalent employer facing less elastic supply curves.[24] Empirical work in labor economics has demonstrated the impact of employers' labor market power on wage suppression.[25] Indirect employers with market power are incentivized to maximize their profits by contracting for fewer workers at lower wages than they would in a competitive labor market. This is profit-maximizing because what they lose in reduced output and revenue they can more than make up for in reduced labor costs by contracting for labor inputs at lower wages.[26] These indirect employers can thus recoup labor and recruitment costs, shifting the benefits of production from wages to profits, while intermediary direct employers and their direct employees suffer the losses in terms of reduced hiring and suppressed wages. This reduction in the amount of labor purchased not only harms direct employers and employees, but also leads to deadweight loss to our country's output.

Thus, indirect employers with enhanced market power—whether as a result of labor market concentration, unlawful acquisition or maintenance of monopsony power, indirect employer collusion, or labor market failures resulting from search frictions and information asymmetries that produce wage penalties on contracted-for labor in the fissured workplace—have the ability to pay lower prices for labor inputs without losing direct employer sellers (franchisees, subcontractors, or other labor input suppliers) to competition from other firms contracting for the same or similar labor inputs.[27]

Employers' increased market power is traceable not only to increased labor market concentration but also to a range of labor market failures that workplace restructuring has

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[22] *Id.* at 29-32.

[23] *See supra* note 13; Suresh Naidu & Eric A. Posner, *Labor Monopsony and the Limits of Law* (Working Paper, Oct. 14, 2018), *available at* https://irs.princeton.edu/sites/irs/files/naidu%20posner%20 limits%20of%20law%20conference%20draft.pdf.

[24] For standard accounts of the definition and effects of employer monopsony and oligopsony power, *see* MANNING, *supra* note 14; Orley Ashenfelter, Henry Farber & Michael Ransom, *Labor Market Monopsony*, 28 J. LAB. ECON. 203, 203-10 (2010).

[25] *See, e.g.*, Arindrajit Dube, Jeff Jacobs, Suresh Naidu & Siddharth Suri, *Monopsony in Online Labor Markets* (NBER Working Paper No. 24416, March 2018); David Autor, David Dorn, Lawrence F. Katz, Christina Patterson & John Van Reenen, *The Fall of the Labor Share and the Rise of Superstar Firms* (IZA Inst. Lab. Econ., Discussion Paper No. 10756); Card et al., *Firms and Labor Market Inequality*, *supra* note 14; Jordan D. Matsudaira, *Monopsony in the Low-Wage Labor Market? Evidence from Minimum Nurse Staffing Regulations,* 96 REVIEW ECON. STAT. 92 (2013); Michael R. Ransom and David P. Sims. *Estimating the Firm's Labor Supply Curve in a 'New Monopsony' Framework: Schoolteachers in Missouri*, 28 J. LAB. ECON. 331 (2010); Douglas O. Staiger, Joanne Spetz, & Ciaran S. Phibbs, *Is There Monopsony in the Labor Market? Evidence from a Natural Experiment,"* 28 J. LAB. ECON. 211 (2010).

[26] CEA I, *supra* note 16, at 2-4.

[27] *See generally* 2B PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW ¶ 575 (3d ed. 2007); ROGER D. BLAIR & JEFFREY L. HARRISON, MONOPSONY IN LAW AND ECONOMICS 1–2 (2010); MANNING, *supra* note 14, at 1–2.

increased, including two-sided and multi-sided differentiation in labor markets, increased search frictions, and decreased wage transparency.[28] Workplace restructuring has meant that labor markets are multiply differentiated by the idiosyncratic preferences of workers choosing employers as well as indirect employers' preferences for direct employers, who then have their own preferences for workers, creating heightened matching frictions.[29] The proliferation of intermediary firms increases the costs on workers in both time and effort to find employment, and because "a worker's existing employer knows that the worker's search cost is high, the employer can reduce compensation—including wages, benefits, and workplace amenities—or fail to increase compensation despite the worker's contributions because the employer knows that the worker can find an alternative job only with difficulty."[30] It also increases the problem of asymmetric information because it is more difficult for workers to discover competing wages or utilize internal labor market mechanisms to gauge wage differentials under horizontal or vertical pay equity structures internal to a single firm.[31] Historically low union density in the private sector and the decline of the real value of the federal minimum wage since its peak of $9.55 (in 2015 dollars) in 1968 reduce the checks on employer wage-setting, whether they be direct employers setting wages or indirect employers contracting for labor inputs.[32]

Employer Collusion. Labor market fissuring and labor market concentration has also facilitated collusive conduct by employers in the form of employers' unilateral conduct as well as wage-fixing, non-compete, and no-poaching agreements, resulting in abuses in the exercise of employer market power and wage suppression. Unlawful collusion to unreasonably restrain labor market competition benefit employers by allowing them to artificially suppress wages.[33] As the U.S. Department of Justice's Antitrust Division ("Antitrust Division") has said, "Robbing employees of labor market competition deprives them of job opportunities, information, and the ability to use competing offers to negotiate better terms of employment."[34] Employer collusion has been particularly widespread in the context of franchising: 58 percent of major franchisors' contracts include "no-poaching-

[28] *See* Naidu, Posner & Weyl, *supra* note 16. For an explanation of two-sided differentiation in labor markets, *see, e.g.*, ALVIN E. ROTH & M. SOTOMAYOR, TWO-SIDED MATCHING: A STUDY IN GAME-THEORETIC MODELING AND ANALYSIS (1990); D. Gale & Lloyd S. Shapley, *College Admissions and the Stability of Marriage*, 69 AMERICAN MATHEMATICAL MONTHLY 9 (1962).
[29] For fuller discussion of differentiation in labor markets, *see* Naidu, Posner & Weyl, *supra* note 16, at 541.
[30] *Id.* at 13.
[31] WEIL, *supra* note 6, at 80; Hiba Hafiz, *Picketing in the New Economy*, 38 CARDOZO L. REV. 1845, 1893 (2018). For information asymmetries in labor markets generally, *see* Joseph E. Stiglitz, *Information and the Change in the Paradigm in Economics*, 92 AM. ECON. REV. 460 (2002).
[32] CEA I, *supra* note 16, at 12-13; News Release, Bureau of Labor Statistics, Union Members—2016 (Jan. 26, 2017), https://www.bls.gov/news.release/archives/union2_01262017.pdf; Naidu, Posner & Weyl, *supra* note 16, at 542, 552. For a recent empirical study of the impact of low unionization rates on increasing employee bargaining power to diminish employers' ability to lower wages in concentrated labor markets, *see* Benmelech, Bergman & Kim, *supra* note 15, at 4-5, 15-19.
[33] *See, e.g.*, DOJ ANTITRUST DIV. & FED. TRADE COMM'N, ANTITRUST GUIDANCE FOR HUMAN RESOURCE PROFESSIONALS (Oct. 2016).
[34] Press Release, U.S. Dep't of Justice, No More No-Poach: The Antitrust Division Continues to Investigate and Prosecute "No-Poach" and Wage-Fixing Agreements (Apr. 10, 2018), https://www.justice.gov/atr/division-operations/division-update-spring-2018/antitrust-division-continues-investigate-and-prosecute-no-poach-and-wage-fixing-agreements.

of-workers agreements,"[35] and an estimated eighteen percent of the U.S. labor force is covered by non-compete agreements based on recent survey evidence.[36] The Antitrust Division has thus taken an aggressive stance that it intends to proceed criminally against naked no-poaching and wage-fixing agreements.[37] In addition to these criminal enforcement actions, the Antitrust Division and class action litigants have filed civil cases against a range of employers for anticompetitive conduct in labor markets, including major Silicon Valley employers, hospitals, sports associations, fast-food franchisors and franchisees, to name a few, for artificially suppressing the wages of high-tech employees, nurses, mixed martial arts fighters, low-wage workers and others, through unlawful monopsony acquisition and maintenance, collusive wage-setting, no-poaching agreements, and non-compete agreements.[38] In the high-tech employees example, defendants Adobe, Apple, Google, Intel, Intuit, Pixar, Lucasfilm and eBay colluded to prevent competition among their workers by agreeing not to cold-call each other's employees, impacting over 64,000 workers and resulting in hundreds of millions of dollars in settlements.[39] But employers in these antitrust actions have also sought antitrust immunity under "single entity" or "integrated enterprise" doctrine, seeking to be recognized as a single employer

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[35] Krueger & Ashenfelter, *supra* note 4, at 4, 6, 24.

[36] OFFICE OF ECON. POLICY, U.S. DEP'T OF TREASURY, NONCOMPETE CONTRACTS: ECONOMIC EFFECTS AND POLICY IMPLICATIONS 6 (Mar. 2016). For prevalence of non-compete agreements, *see also* ALAN KRUEGER & ERIC A. POSNER, A PROPOSAL FOR PROTECTING LOW-INCOME WORKERS FROM MONOPSONY AND COLLUSION (Hamilton Project, Feb. 27, 2018), *available at* http://www.hamiltonproject.org/assets/files/protecting_low_income_workers_from_monopsony_collusion_krueger_posner_pp.pdf; Evan Starr, J.J. Prescott & Norman D. Bishara, *Noncompetes in the U.S. Labor Force* (U. of Michigan Law & Econ. Research Paper No. 18-013, Sept. 13, 2018), *available at* https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2625714&download=yes; Norman D. Bishara & Evan Starr, *The Incomplete Noncompete Picture*, 20 LEWIS & CLARK L. REV. 497, 498–504 (2016).

[37] *Id.*

[38] *See generally* OFFICE OF ECON. POLICY, U.S. DEP'T OF TREASURY, NONCOMPETE CONTRACTS, *supra* note 34, at 4, 11–12; Krueger & Ashenfelter, *supra* note 4; Press Release, Office of Pub. Affairs, U.S. Dep't of Justice, Justice Department Requires eBay to End Anticompetitive "No Poach" Hiring Agreements (May 1, 2014), https://www.justice.gov/opa/pr/justice-department-requires-ebayend-anticompetitive-no-poach-hiring-agreements; Sarah Cwiek, *Detroit Medical Center Agrees to Settle with Nurses, End Long-Running Antitrust Lawsuit*, MICH. RADIO (Sept. 14, 2015), http://michiganradio.org/post/detroit-medical-center-agreessettle-nurses-end-long-running-antitrust-lawsuit; Lance Whitney, *Apple, Google, Others Settle Antipoaching Lawsuit for $415 Million*, CNET (Sept. 3, 2015, 8:32 AM), https://www.cnet.com/news/apple-google-others-settle-anti-poaching-lawsuit-for-415-million; Seth Rosenblatt, *Judge Approves First Payout in Antitrust Wage-Fixing Lawsuit*, CNET (May 16, 2014, 3:51 PM), https://www.cnet.com/news/judge-approves-first-payout-in-antitrust-wage-fixing-lawsuit; Dave Jamieson, *Jimmy John's Makes Low-Wage Workers Sign "Oppressive" Noncompete Agreements*, HUFFINGTON POST (2014), https://www.huffingtonpost.com/2014/10/13/jimmy-johns-non-compete_n_5978180.html. Prevalence of non-compete agreements among workers unlikely to have trade secrets also evidences monopsony power; Roger D. Blair & Christina DePasquale, *Monopsony and Countervailing Power in the Market for Nurses*, ANTITRUST HEALTH CARE CHRON., Dec. 2010, at 2, http://economics.emory.edu/home/documents/documents/Depasqualechristina_1.pdf; Press Release, Office of Pub. Affairs, U.S. Dep't of Justice, Justice Department Requires Six High Tech Companies to Stop Entering into Anticompetitive Employee Solicitation Agreements (Sept. 24, 2010) [hereinafter Press Release, DOJ Requires Six High Tech Companies], https://www.justice.gov/opa/pr/justice-departmentrequires-six-high-tech-companies-stop-entering-anticompetitive-employee; Press Release,
U.S. Dep't of Justice, Justice Department Reaches Settlement with the Arizona Hospital and Healthcare Association and Its Subsidiary (May 22, 2007), https://www.justice.gov/archive/atr/public/press_releases/2007/223470.htm.

[39] Whitney, *supra* note 36.

for antitrust purposes even as they seek to avoid "employer" status under the labor and employment laws.[40]

Employer collusion has allowed indirect employers to benefit from industry-wide wage suppression that, but for the collusion, could be remediated by workers negotiating for higher wages with direct employers. In other words, horizontal collusion allows employers to shift away from wage-negotiators to conspirator wage-setters determining the compensation rates of other employers' employees through agreements with those employers. Such collusion makes indirect employers *as* determinative of workers' wages and terms and conditions of employment as direct employers. Additionally, indirect employers can use vertical restraints in franchising and other supplier arrangements to artificially suppress wages through price-setting for direct employers' labor inputs.[41]

2. The joint-employer NPRM is not based on reasoned decision-making and fails to properly consider the value of taking no action or adopting a "joint-employer" definition that includes indirect employers with sufficient market power as "joint employers."

The joint-employer NPRM is arbitrary and capricious in failing to analyze the relevant data on labor market concentration, increased employer market power, and collusion on defining who comes within the definition of joint employment. *Motor Vehicle Mfrs. Ass'n v. State Farm Auto Mutual Ins. Co.*, 463 U.S. 29, 43 (1983); 5 U.S.C. § 706(2)(A). The NLRB's policy decisions must reflect the reasoned exercise of expert judgment, *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 167-68 (1962), and it is the NLRB's "duty to consider responsible alternatives to its chosen policy and to give a reasoned explanation for its rejection of such alternatives," particularly "where it admits . . . that the choice embraced suffers from noteworthy flaws." *Brookings Municipal Tel. Co. v. FCC*, 822 F.2d 1153, 1169 (D.C. Cir. 1987). The Board admits that it did not cite "peer reviewed research demonstrating a causal connection between the Board's current joint-employer standard and the national employment rate or the employment rate of any state or political subdivision" because the NLRA "prohibits the Board from hiring individuals to conduct the economic analysis members of Congress asked about.[42] But the Board majority appears to invite anecdotal evidence submitted by employers while ignoring a crucial study, cited by dissenting Member McFerran, finding that 58% of major franchisors' franchise agreements with franchisees include no-poaching clauses that limit worker earnings, mobility and wage discovery—a contractual restriction that should clearly warrant an expansion of "joint employer" status beyond the Board's proposed NPRM.[43] Beyond mere

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[40] *See generally* Prof. Sanjukta Paul et. al.'s Comment to *The Standard for Determining Joint-Employer Status* (Dec. 13, 2018).

[41] *See, e.g.*, Brian Callaci, *Vertical Power and the Creation of the Fissured Workplace: The Case of Franchising* (2018) (analyzing 530 franchise contracts to show how vertical restraints allow franchisors to shift costs to subordinate firms; Krueger & Ashenfelter, *supra* note 4.

[42] Letter from Chairman John F. Ring to Reps. Patty Murray & Bobby Scott (Oct. 23, 2018), http://src.bna.com/CKF.

[43] *See* Krueger & Ashenfelter, *supra* note 4; Robert Iafolla, *Anecdotal Evidence for "Joint Employment" Rule May Not Be Enough*, BLOOMBERG NEWS (Nov. 15, 2018), *available at* https://www.bna.com/anecdotal-evidence-joint-n57982093879/ (quoting Chairman Ring as stating that he

reliance on anecdotal evidence, the Board must avail itself of this and other recent theoretical and empirical peer-reviewed research on labor markets and wage determination in this comment period.

As an economic matter, "possess[ion] and actual[] exercise [of] substantial direct and immediate control over the employees' essential terms and conditions of employment in a manner that is not limited and routine" (p. 46687, column 2, paragraph 2) (emphasis added) is irrelevant for actual wage determination when indirect employers with market power are wage-setters. By failing to consider and assess the extensive theoretical and empirical literature on the fissured workplace as well as the industrial organizations and labor economics literature on the impacts of indirect employer market power in wage-setting, the NLRB's NPRM wrongly excludes as "joint employers" labor contracting parties that the social scientific literature has found in fact determine workers' wages and working conditions, and the Board has done this without reasoned explanation. *Portland Cement Ass'n v. Ruckelshaus*, 486 F.2d 375, 393 (D.C. Cir. 1973) ("It is not consonant with the purpose of a rule-making proceeding to promulgate rules on the basis of inadequate data, or on data that, to a critical degree, is known only to the agency."). Board Member Lauren McFerran recognizes this in her dissenting view. *See* p. 46688, column 2, paragraph 1 ("The majority cites no evidence of 'continuing uncertainty in the labor-management community"); *id.* at footnote 17 ("To the extent that the majority is relying on anything other than anecdotal evidence of this alleged uncertainty, it is required to let the public know the evidentiary basis of its conclusion."); *id.* at 46691, column 3, paragraph 4 ("The majority's simplified examples . . . [do not] address issues of current concern implicating joint employment—such as, for example—the recent revelation that national fast-food chains have imposed 'no poaching' restrictions on their franchisees that limit the earnings and mobility of franchise employees . . . .").

3. The joint-employer NPRM fails to minimize any significant economic impact on small businesses and labor unions.

The NLRB must consider "any significant alternatives to the proposed rule which accomplish the stated objectives of applicable statutes and which minimize any significant economic impact of the proposed rule on small entities," including small businesses and small-entity labor unions. 5 U.S.C. § 603(c); 13 CFR 121.201. Relative to alternative joint-employer standards, including the current *Browning-Ferris* joint-employer standard, the proposed NPRM: (1) dramatically limits workers' ability to counteract employer monopsony and oligopsony power; and (2) fails to properly calculate the costs and inefficiencies that result to small businesses and labor unions from the exercise of such power: namely, artificial wage suppression and reduced hiring (or deadweight loss). The NLRB's failure to reasonably assess more expansive definitions of "joint employers" that would include indirect employers with market power over workers' wages and terms and conditions of work, as well as its failure to reasonably assess the alternative of taking no action and leaving the *Browning-Ferris* joint-employer standard in place, violates 5 U.S.C. § 603(c).

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foresees testimonials from businesses explaining their experiences with the current standard as part of the evidence supporting the proposed changes in the NPRM).

Significant Economic Impact on Small Businesses. The NLRB's failure to incorporate indirect employers with market power over workers' wages in its NPRM will harm small businesses more than the existing *Browning-Ferris* rule and/or alternative joint-employer standards. First, as a matter of economic theory, an indirect employer with market power over small businesses supplying contracted-for labor inputs faces an upward-sloping supply curve, and it is profitable for that indirect employer to reduce and artificially suppress payment for labor inputs from those businesses.[44] Further, by shifting labor costs and liabilities to smaller business entities or third-party labor intermediaries, indirect employers increase small businesses' costs.[45] This decreases intermediary direct employers' profitability and confers rents to indirect employer purchasers of labor inputs.[46] As David Weil has explained, "conditions at the secondary level (and below) are frequently tough: competitive, price sensitive, and subject to fluctuating demand."[47] High insolvency and turnover rates of small businesses are the direct result of franchisor market power artificially suppressing workers' wages downstream while profitably extracting rents from their labor: "Since the franchisor receives payment from royalties linked to revenues but does not face the direct costs of employing workers . . ., it can still earn reasonable returns even given tough market conditions and downward pricing pressure."[48]

The estimated costs described in Section V.A and V.B., pp. 46692-94, of the NPRM thus fail to consider the real costs of the NPRM on small businesses. NLRB is required in its Initial Regulatory Flexibility Analysis ("IRFA") under the Regulatory Flexibility Act of 1980 ("RFA"), 5 U.S.C. 601, *et seq.* to "develop alternatives wherever possible, when drafting regulations that will have a significant impact on a substantial number of small entities." (pp. 46692-46693). While the Board stated that it "believes that this rule will likely not have a significant impact on a substantial number of small entities" (p. 46693, column 1, paragraph 3), it has not substantiated this belief with any evidence. In fact, the Board admits that it "does not have the means to identify precisely how many businesses are impacted by contracting and subcontracting within the U.S., or how many contractors and subcontractors would be small businesses as defined by the SBA" (p. 46694, column 1, paragraph 2), and that it "does not have the means to identify precisely how many franchisees operate within the U.S., or how many are small businesses as defined by the SBA" (p. 46694, column 2, paragraph 3).

Instead of reviewing the existing and robust empirical evidence of workplace fissuring on small businesses, the Board looked only to the frequency with which the "joint-employer" issue presented itself to the Board as evidence of impact on small business. The Board's determination that "approximately 0.028% of all 5.9 million business firms" (p. 46693, column 3, paragraph 2), or 165,200, are affected based on its case load defies figures presented in social scientific studies. Those studies estimate the number of small entities

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[44] For an explanation of the economic theory supporting monopsonistic and oligopsonistic pricing, *see generally* MANNING, *supra* note 14, at 29-52.

[45] Weil, *Enforcing Labor Standards in Fissured Workplaces*, at 37.

[46] WEIL, *supra* note 6, at 88-90.

[47] *Id.* at 100. *See also* Dilip Mookherjee & Masatoshi Tsumagari, *The Organization of Supplier Networks: Effects of Delegation and Intermediation*, 72 ECONOMETRICA 1179, 1179-1219 (2004).

[48] WEIL, *supra* note 6, at 139-42

bound up in supply-chain and contracting relationships that involve wage-setting by indirect employers with market power over small businesses at a much higher rate—in the franchising context alone, 58% of franchisor contracts contain "no-poaching-of-workers agreements."[49] The Board's claim that "employers will only be directly impacted" by the NPRM "when they are alleged to be a joint employer in a Board proceeding" (p. 46695, column 1, paragraph 1) defies basic principles of economics: (1) it ignores that businesses will structure their transactions based in part on legal costs of compliance; and (2) overlooks that, where employers with market power can artificially suppress remuneration for work, workers and small businesses bear the costs entirely, regardless of whether they present representation petitions and unfair labor practices against indirect employers before the National Labor Relations Board. The Board's cursory calculation also defies the Regulatory Flexibility Act's requirements, which impose obligations on the Board to determine how its rulemaking will impact future employers. *See Mid-Tex Elec. Co-op v. FERC*, 773 F.2d 327, 342 (D.C. Cir. 1985) ("[I]t is clear that Congress envisioned that the relevant 'economic impact' was the impact of compliance with the proposed rule on regulated small entities.").

The Board has thus not considered the ways in which the exercise of indirect employer market power and collusion within supply chains, franchise arrangements, or other contracting arrangements compels small, intermediary employers to artificially suppress workers' wages while allowing contracting parties to collect the rents. This harms small businesses in two ways: (1) it limits their ability to hire workers and grow; and (2) it extracts profits that small, intermediary employers would have collected but for their being compelled to pass it on to contracting parties that have market power over their sale of labor services.

With no empirical evidence cited to support its assertions, the Board states: "We conclude that the proposed rule imposes . . . no lost sales and profits resulting from the proposed rule; no changes in market competition as a result of the proposed rule and its impact on small entities or specific submarkets of small entities; and no costs of hiring employees dedicated to compliance with regulatory requirements" (p. 46695, column 1, paragraph 2). The Board continues: "fewer employers may be alleged as joint employers, resulting in lower costs to some small entities. The Board is without the means to quantify such costs and welcomes any comment or data on this topic" (p. 46695, column 2, paragraph 1). But while the RFA requires agencies to provide "either a *quantifiable* or *numerical* description of the effects of a proposed rule or alternatives to a proposed rule," the Board does not justify why it opts for the RFA's third option, "more *general descriptive* statements" due to quantification neither being "practicable or reliable" (p. 46695, column 2, footnote 71 (citing 5 U.S.C. 607)) (emphasis added).

In fact, there is considerable data on, for example, the impact of employer collusion on franchisees, as cited above as well as by Member Lauren McFerran at p. 46692, column 1, footnote 40 (citing Alan B. Krueger & Orley Ashenfelter, "Theory and Evidence on Employer Collusion in the Franchise Sector," Princeton University Working Paper No. 614 (Sept. 28, 2017), available at http://arks.princeton.edu/ark:/88435/dsp014f16c547g), to

[49] Krueger & Ashenfelter, *supra* note 4.

name just one. There is increasing empirical evidence that small businesses are harmed as a result of indirect employer market power by being squeezed of revenues, pushed into accepting lower and lower margins, and going bankrupt in a range of supply-chain arrangements, and particularly in franchising arrangements. Franchising contracts utilize vertical restraints that allow indirect employer franchisors to shift costs to direct employer firms.[50] For example, franchising in the janitorial services sector indicates high annual turnover rates of 15% from franchisees exiting the industry.[51] Indirect franchisor employers' use of no-poaching and non-compete agreements enable direct franchisee employers to pay artificially suppressed wage rates while reducing turnover, facilitating a "low-wage strategy."[52] Evidence thus suggests that, if workers are able to collectively bargain with both direct employers and indirect employers that have market power over their direct employer, they could mitigate rents indirect employers reap at the expense of both themselves and their direct employers by negotiating their wages up above artificially suppressed rates.

Due to these costs, the rule may well contribute to small business insolvency, a key criterion under the Small Business Administration Guide, and there is strong reason to believe that, in light of the theoretical discussion and empirical evidence cited above, the cost of the proposed regulation will: "(a) eliminate more than 10 percent of the businesses' profits; (b) exceed one percent of the gross revenues of the entities in a particular sector; or (c) exceed five percent of the labor costs of the entities in the sector" (p. 46695, column 3, paragraph 3 (citing SBA Guide at 19)). The Board lists this criterion as a necessary consideration on p. 46695, column 3, paragraph 2, but fails to review or consider any relevant data.

Significant Economic Impact on Labor Unions. The NPRM also fails to properly consider its impact on small-entity labor unions, concluding, without providing a monetary or cost estimate of its impact, that "the proposed rule impacts labor unions generally," (*see* p. 46693, column 1, paragraph 3; p. 46694, column 3, paragraph 2), even though it calculates that 97.6% of total labor union firms are small businesses (p. 46694, column 3, paragraph 2). The Board's failure to cite empirical evidence and failure to properly calculate the costs of the NPRM on labor unions violates 5 U.S.C. § 603(c). As discussed above, indirect employers' exercise of market power on direct employers leads to reduced employment and suppressed worker pay. Both effects reduce worker contributions to labor unions in the form of union dues, which are calculated as a percentage of gross pay.[53] In fact, a leading non-profit think tank, the Economic Policy Institute, conservatively

[50] *See* Brian Callaci, *Vertical Power and the Creation of a Fissured Workplace: The Case of Franchising*, (Sept. 5, 2018), *available at* https://briancallaci.files.wordpress.com/2018/12/callaci_jmp_november.pdf.
[51] WEIL, *supra* note 4, at 141.
[52] Krueger & Ashenfelter, *supra* note 4.
[53] *See, e.g.*, Ben Casselman, *Closer Look at Union vs. Nonunion Workers' Wages*, WALL ST. J. (Dec. 17, 2012), http://blogs.wsj.com/economics/2012/12/17/closer-look-atunion-vs-nonunion-workers-wages (estimating average agency fees at 2% of wages and full union dues at approximately 3% of wages).

estimates that, if the proposed rule is finalized, the cost to workers would be a transfer of $1.3 billion to employers in the form of lost earnings below a union wage.[54]

4. The joint-employer NPRM frustrates the NLRA's purposes.

The joint employer NPRM also frustrates the purposes of the NLRA as stated in Section 1 of the Act: ensuring equal bargaining power between employees and employers, and stabilizing competitive wage rates and working conditions within and between industries determined through bargaining between workers with "full freedom of association [and] actual liberty of contract" and "employers who are organized in the corporate or other forms of ownership association." 29 U.S.C. § 151; *see also NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 33-34 (1937) (describing the "reason for labor organizations" as "essential to give laborers opportunity to deal on an equality with their employer"). Failing to incorporate indirect employers with market power to determine workers' wages and working conditions prevents equal bargaining power between employees and the indirect employers because it allows those indirect employers to engage in wage-setting, "organized in the corporate form," without facing any countervailing power by workers or legal obligations to collectively bargain.[55]

Further, failing to evaluate the microeconomic effects of its proposed NPRM and existing or alternative joint employer definitions obviates the NLRA's purpose of stabilizing competitive wage rates, ignoring how its definitional parameters of joint employment can limit workers' ability to negotiate up artificially suppressed wages with those who

[54] Comment, Economic Policy Institute, *The Standard for Determining Joint-Employer Status* (Dec. 10, 2018), at 4, *available at* https://www.epi.org/publication/epi-comments-regarding-the-standard-for-determining-joint-employer-status/.

[55] See generally WEIL, *supra* note 6, at 7–27 (collecting empirical literature on the decline in workers' real wages, benefits, employment security, and ability to voice concerns in a "fissured" workplace); *see also* LABOR IN THE NEW ECONOMY (Katharine G. Abraham et al. eds., 2010) (collecting essays by leading economists on the effects of corporate restructuring on earning inequality, benefits, job security, work hours, and workplace health and safety); MARK BARENBERG, ROOSEVELT INST., WIDENING THE SCOPE OF WORKER ORGANIZING: LEGAL REFORMS TO FACILITATE MULTI-EMPLOYER ORGANIZING, BARGAINING, AND STRIKING 1–10 (Oct. 7, 2015), http://rooseveltinstitute.org/wp-content/uploads/2015/10/Widening-the-Scope-of-Worker-Organizing.pdf (discussing the diminution of labor's bargaining power under corporate restructuring); ANNETTE BERNHARDT, ROOSEVELT INST., THE ROLE OF LABOR MARKET REGULATION IN REBUILDING ECONOMIC OPPORTUNITY IN THE U.S. 1–13 (Mar. 25, 2014) (arguing for strengthened labor regulation due to growing employer evasion of legal responsibility under new corporate structures); Harry C. Katz, *United States: The Spread of Coordination and Decentralization Without National-Level Tripartism*, in THE NEW STRUCTURE OF LABOR RELATIONS: TRIPARTISM AND DECENTRALIZATION 192, 192–212 (Harry C. Katz, et al. eds., 2004) (discussing effects of decentralized collective bargaining on worker bargaining power in the United States); Kate Andrias, *New Labor Law*, YALE L.J. ___, 13–31 (discussing the relationship between economic restructuring and the decline of worker influence in their workplaces and in policy-making at the state and federal levels); Craig Becker, *Labor Law Outside the Employment Relation*, 74 TEX. L. REV. 1527 (1996) (describing the transition and evolution of employment relationships with the decline of the manufacturing sector and the rise of the service sector).

determine their wages.[56] Efficient bargains in the workplace can also reduce labor unrest.[57] Specifically, failing to incorporate indirect employers with market power over direct employers' labor inputs frustrates the "practice and procedure of collective bargaining," 29 U.S.C. § 151, because, under the Board's own justification for regulating joint employment in the first instance, "[w]here collective bargaining under the law is not an option, workers have no choice but to use other means to improve their terms and conditions of employment. Economic pressure predictably will be directed at the business entities that control a workplace, whether or not the Board recognizes them as employers." (p. 46690, column 2, paragraph 3). Moreover, "reduc[ing] opportunities for collective bargaining . . . effectively shortens the reach of the act" (p. 46689, column 1, paragraph 1).[58]

5. The joint-employer NPRM conflicts with existing federal law and rules.

In Section V.D of the NPRM, the Board states that it "has not identified any federal rules that conflict with the proposed rule," and it "welcomes comments that suggest any potential conflicts not noted in this section" (p. 46695, column 3, paragraph 5). As discussed below, the proposed rule conflicts with: (1) administrative law requirements for cost-benefit analysis; and (2) Executive Order 13,725 ("Steps to Increase Competition and Better Inform Consumers and Workers to Support Continued Growth of the American Economy"), which requires agencies to use their authorities to promote competitive labor markets.[59]

Administrative Law. The Supreme Court and federal courts of appeal, when reviewing rulemakings of independent regulatory agencies, has required those agencies to "consider cost—including, most importantly, cost of compliance, before deciding whether regulation is appropriate and necessary." *Michigan v. Environmental Protection Agency*, 135 S. Ct. 2699, 2711 (2015); *see also Business Roundtable v. Securities and Exchange Commission*,

[56] 29 U.S.C. § 151 (identifying in its "findings and declaration of policy" of the NLRA the restoration of equal bargaining power between employers and employees as a purpose of the NLRA where unequal bargaining power prevents "the stabilization of competitive wage rates and working conditions within and between industries").

[57] Kenneth G. Dau-Schmidt, *A Bargaining Analysis of American Labor Law and the Search for Bargaining Equity and Industrial Peace*, 91 MICH. L. REV. 419, 491-93 (1992) (arguing that measures to reduce strikes maximize welfare; Eric A. Posner, *Four Economic Perspectives on American Labor Law and the Problem of Social Conflict*, 159 J. INSTITUTIONAL & THEORETICAL ECON. 101, 102-03, 106-07, 113-115 (2003) (arguing that labor law can promote conflict resolution and order). For case law emphasizing the purposes of industrial peace and the free flow of commerce, see, e.g., *NLRB v. Fin. Inst. Emps. of Am.*, 475 U.S. 192, 208 (1986) (stating that the Act's basic purpose "is to preserve industrial peace"); *First Nat'l Maint. Corp. v. NLRB*, 452 U.S. 666, 674 (1981) (stating the Act's fundamental aim as "the establishment and maintenance of industrial peace to preserve the flow of interstate commerce").

[58] The behavioral economics literature has also highlighted the significance of workers' perceptions of wage fairness—with respect to their own wage and with respect and relative to others' wages working alongside them—on productivity and high-quality job performance. *See, e.g.*, WEIL*, supra* note 6, at 81-83 (summarizing behavioral economics literature); *see also* BEWLEY (explaining the existence of pay equity structures and nominal wage rigidity on fairness grounds); Daniel Kahneman et al., *Fairness as a Constraint on Profit Seeking: Entitlements in the Market*, 76 AM. ECON. REV. 728, 739-40 (1986) (finding that fairness constraints apply to wage-setting).

[59] As stated in Prof. Sanjukta Paul et. al.'s Comment to *The Standard for Determining Joint-Employer Status* (Dec. 13, 2018), the proposed joint-employer rule exacerbates the labor law's conflict with the treatment of franchising arrangements under "single entity" or "integrated enterprise" doctrine under antitrust law.

647 F.3d 1144 (D.C. Cir. 2011); *Corrosion Proof Fittings v. Environmental Protection Agency*, 947 F.2d 1201 (5th Cir. 1991). While the state of the law is still unclear as to whether "consider[ing] cost" requires independent agencies to perform a full cost-benefit analysis, the Supreme Court has come a long way from *Whitman v. American Trucking*, 531 U.S. 457 (2001), in its recent jurisprudence, holding that a statute that nowhere mentions costs "nonetheless *requires* consideration of costs—and requires that costs not significantly exceed benefits."[60] Further, administrative law scholars have argued that Section 706 of the Administrative Procedure Act requires agencies to conduct cost-benefit analysis absent explicit statutory language to the contrary in order to survive "arbitrary and capricious" review.[61]

In its joint-employer NPRM, the Board identified the proposed rulemaking as "significant." (*See*, *e.g.*, p. 46695, column 3, paragraph 2). But, as discussed above, the Board has admitted that it has not engaged in economic analysis of its own because of the NLRA's statutory ban on hiring individuals to conduct economic analysis. That fact, however, does not obviate the agency's obligation to assess the costs of its NPRM relative to its benefits, beyond mere costs to small businesses and labor unions.

Executive Order 13,725. Additionally, the joint-employer NPRM conflicts with Executive Order 13,725 ("EO 13,725"). EO 13,725 encourages agencies "with authorities that could be used to enhance competition" to "build upon efforts to detect abuses such as . . . anticompetitive behavior in labor and other input markets, exclusionary conduct, and blocking access to critical resources that are needed for competitive entry" (Section 2(b)). Section 1 of EO 13,725 identifies unlawful collusion over wages and wage-fixing as "stifl[ing] competition and erod[ing] the foundation of America's economic vitality. The immediate results of such conduct—. . . less innovation, fewer new businesses being launched, and reduced opportunities for workers—can impact Americans in every walk of life." The Order states as federal policy that agencies contribute to promoting competitive markets through "pro-competitive rulemaking and regulations, and by eliminating regulations that create barriers to or limit competition. Such Government-wide action is essential to ensuring that . . . workers . . . [and] small businesses . . . reap the full benefits of competitive markets." (*id.*)

Under Section 3(b) of EO 13,725, "[i]ndependent agencies are strongly encouraged to comply with the requirements of this order." By ignoring economic theory and social scientific research on the consolidation and abuse of indirect employer market power over direct employers' wage-setting—and even encouraging legal impunity for those indirect employers from labor law's requirements—the joint-employer NPRM fails to comply with EO 13,725. In fact, by ignoring market power considerations in employer wage-setting, the Board—the only administrative agency tasked with regulating labor protections—removes from its scrutiny and analysis basic economic considerations of how labor markets work to determine wages and to impact the substance and efficacy of the NLRA's labor rights

[60] *See* Jonathan Masur & Eric Posner, *Cost-Benefit Analysis and the Judicial Role*, 85 U. CHI. L. REV. 935, 972-76 (2018) (citing *Michigan v. EPA*, 135 S. Ct. 2699, 2711 (2015)).
[61] *See, e.g.*, Cass R. Sunstein, *Cost-Benefit Analysis and Arbitrariness Review*, 41 HARV. ENVIR L. REV. 1, 3 (2017).

protections. At the very least, the Board must explain why it failed to include franchisors that include no-poaching clauses in franchise agreements as "joint employers," particularly in light of unrefuted and well-researched evidence of their prevalence.[62]

6. **The NLRB should take no action, letting the *Browning-Ferris* decision, recently affirmed by the D.C. Circuit, stand, or, in the alternative, the joint-employer NPRM should incorporate employers with market power over workers' wages and working conditions as "joint employers" under Section 2(2) of the NLRA.**

The NLRB should take no action, letting the *Browning-Ferris* joint-employer standard, recently affirmed by the D.C. Circuit,[63] stand, in order to include employers with indirect control over the "means or manner of employees' work and terms of employment," even if that control is limited and routine or not exercised.[64] The scope of *Browning-Ferris*'s definition is sufficient to cover indirect employers with market power that engage in wage-setting for direct employers' employees, thus either directly determining labor input prices and direct employer compensation or impacting direct employers' ability to fully compensate their direct employees due to artificially-suppressed contract pricing.

Alternatively, indirect employers with sufficient market power—whether through unilateral acquisition and maintenance of monopsony power or through contractual agreements with direct employers, collusion, or oligopsonistic coordination—in the direct employer's product market or the relevant labor market to determine workers' wages and/or terms and conditions of work should be deemed "joint employers."[65] At the very least, the Board should expand its definition of "joint employer" to franchisors that include no-poaching clauses in franchise agreements: such blatant restrictions on labor market competition that limit worker earnings, mobility and wage discovery would clearly require a finding of joint-employer status.[66] The NLRB can look to tests established by antitrust authorities to determine whether market power is sufficient to trigger "joint employer status." For example, "sufficient market power" may be shown through direct or indirect evidence that the purported indirect employer faces an upward sloping supply curve—that the employer can profitably depress wages below prevailing market levels by withholding the purchase of labor inputs and not losing sellers of those inputs to other purchasers or employers.[67] The Department of Justice and Federal Trade Commission Merger Guidelines treat the ability of an employer to profitably reduce payment for labor services by a small but significant nontransitory amount (usually 5%) as a key threshold for monopsony

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[62] Krueger & Ashenfelter, *supra* note 4.

[63] *Browning-Ferris Indus. of Cal., Inc.*, No. 16-1028, 2018 U.S. App. LEXIS 36706 (D.C. Cir. Dec. 28, 2018) (holding as a matter of law that the "right-to-control element of the Board's joint-employer standard has deep roots in the common law" and that "the common-law inquiry is not woodenly confined to indicia of direct and immediate control; an employer's indirect control over employees can be a relevant consideration").

[64] *Browning-Ferris Indus. of Cal., Inc.*, 362 N.L.R.B. 186, 2, 15-16, 18-21 (2015).

[65] For an example of how to conduct analysis of market power in the context of indirect employers, *see* Hafiz, *supra* note 31, at 1901-06.

[66] *See* Krueger & Ashenfelter, *supra* note 4.

[67] *Broadcom Corp. v. Qualcomm, Inc.*, 501 F.3d 297, 307 (3d Cir. 2007); *see also* Samuel Muehlemann et al., *Monopsony Power, Pay Structure, and Training*, 66 ILR REV. 1097, 1097-99 (2013) (discussing direct and indirect evidence of monopsony power).

power.[68] A similar threshold could be used to determine whether an indirect employer should be deemed a "joint employer."

Indirect employers' market power could also be shown through evidence of that employer's market share in a relevant geographic market for labor inputs protected by entry barriers.[69] Courts have found a twenty percent market share to be sufficient to infer buyer market power over sellers of labor inputs.[70] But recent empirical literature has shown that labor market concentration is much more prevalent than previously understood, and buyers of or contractors for labor inputs with much lower market shares can exert significant market power over sellers of those inputs.[71] For example, high-volume retailers have tremendous leverage over suppliers, especially where the market for particular products is relatively small but benefits from resale in high-distribution, nationally-scaled businesses like Amazon.com or Wal-Mart are high.[72]

Both the *Browning-Ferris* "joint employer" definition and the expanded market power definition are consistent with agency law standards under Section 2(2) as well as Supreme Court precedent on common law agency doctrine.[73] The Board concedes that the *Browning-Ferris* standard is consonant with common law agency doctrine and does not justify its rulemaking on grounds that *Browning-Ferris* contravenes that doctrine (p. 46686, column 1-2). Thus, for the reasons stated in the *Browning-Ferris* decision, including entities with indirect control over employers' wages and working conditions is consistent with common law agency doctrine and the *Restatement (Second) of Agency*.[74]

That same precedent also supports a definition of "joint employer" that includes those indirect employers with "sufficient market power" over a direct employees' product market or the labor market for its inputs. First, federal courts recognize under "subservant" doctrine in cases incorporating the common-law standard for determining employment relationships that an employer's control can be exercised indirectly in circumstances where a second employer directly controls the employee.[75] The NLRB has also recognized that an indirect employer can have control over direct employers' employees based on

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[68] DOJ and FTC, Horizontal Merger Guidelines, §4.1.2 ("The Agencies most often use a SSNIP [small but significant and non-transitory increase in price] of five percent of the price paid by customers for the . . . services to which the merging firms contribute value.").

[69] United States v. Microsoft Corp., 253 F.3d 34, 51 (D.C. Cir. 2001) (en banc) (per curiam); I A.B.A, ANTITRUST LAW DEVELOPMENTS (SIXTH) 229 (Jonathan M. Jacobson et al. eds., 6th ed. 2007).

[70] Toys "R" Us, Inc. v. FTC, 221 F.3d 928, 937 (7th Cir. 2000).

[71] *See* Benmelech, Bergman & Kim, *supra* note 15; Maurice E. Stucke, *Looking at the Monopsony in the Mirror*, 62 EMORY L.J. 1509, 1538-39 (2013).

[72] Conwood Co. v. U.S. Tobacco Co., 290 F.3d 768, 776-77 (6th Cir. 2002); Stucke, *supra* note 71, at 1538-39; *see also* Barry C. Lynn, *Breaking the Chain: The Antitrust Case Against Wal-Mart*, HARPER'S MAG., July 2006, at 29, 29-36.

[73] *See, e.g.*, *Boire v. Greyhound Corp.*, 376 U.S. 473, 481 (1964) (holding that a putative joint employer must "possess[] sufficient control over the work of the employees to qualify as a joint employer," and stressing that the inquiry is not controlled by the fact that one putative employer is an independent contractor of another).

[74] *Browning-Ferris*, 362 N.L.R.B. at 12-15.

[75] *See, e.g.*, *Kelley v. Southern Pacific Co.*, 419 U.S. 318, 325 (1974); *Browning-Ferris*, 2018 U.S. App. LEXIS 36706, at *45-46 & n.12; *Schmidt v. Burlington Northern & Santa Fe Railway Co.*, 605 F. 3d 686, 689–690 (9th Cir. 2010); *Allbritton Communications Co. v. NLRB*, 766 F.2d. 812, 818–819 (3d Cir. 1985).

contracted-for labor input pricing that determines the direct employers' compensation of its employees.[76] Finally, the *Restatement (Second) of Agency*'s definition of "servant" under Section 220(1) is capacious enough to include those whose wages are set by an indirect employer because ability to determine wages is a standard means of control or right to control.[77] Each example listed in the NPRM (p. 46697) as constituting a "joint employer" relationship is consistent with this revised definition of "joint employer," and in each example where such a relationship is not found, the "sufficient market power" standard would not create one. This is because, in each of the examples, Company A is not free to set wages and benefits of its employees as it sees fit due to Company B's market power over Company A's product or relevant labor market. In fact, the NPRM's "joint employer" definition would be more clearly described were it to incorporate such precise social scientific terminology.

Further, compared to the NPRM's "joint employer" definition, leaving the *Browning-Ferris* decision in place or redefining the definition based on a "sufficient market power" standard is less costly on small businesses, labor organizations and workers because it would reduce inefficiencies created by indirect employer monopsony or oligopsony power and allow for the restoration of workers' proper compensation, promote equal bargaining power between employees and their indirect employers, and thus allow them to effectively bargain collectively with both direct and indirect employers to lift artificially suppressed wages.

7. **Taking no action or expanding the definition of "joint employer" fulfills the NLRA's purposes.**

Retaining the *Browning-Ferris* "joint employer" standard as affirmed by the D.C. Circuit or expanding the Board's proposed rule to include as "joint employers" those with sufficient market power will foster predictability and consistency regarding determinations of joint-employer status, promoting labor-management stability. First, as to administrability, the existing *Browning-Ferris* or the proposed "market power" expansion to the Board's new rule require less unpredictable balancing of vague factors, and the proposed expansion would allow review of direct and indirect evidence of indirect employers' market power, a standard the Department of Justice's Antitrust Division and the Federal Trade Commission are tasked with determining as a routine matter. At the very least, a social scientifically anchored way of determining agency under the common law fosters more predictability and consistency than that stated in the NPRM, which itself revives a standard that has not withstood consistent interpretation and leaves significant ambiguity as to its scope, applicability and relevance. As the above theoretical and empirical studies show, industrial organizations and labor economists have deployed

[76] *See, e.g.,Floyd Epperson*, 202 NLRB 23 (1973) (finding that United had an indirect control over drivers' wages because wage increases to a direct employer's drivers came from raises given by United to the direct employer, a sole proprietor).

[77] *Restatement (Second) of Agency* § 220(l) ("A servant is a person employed to perform services in the affairs of another and who with respect to the physical conduct in the performance of the services is subject to the other's control or right to control."); *id.* §§ 5, 5(2), comment e (recognizing the common law "subservant" doctrine and addressing cases in which one employer's control is or may be exercised indirectly, while a second employer directly controls the employee).

economic methods to determine market power for decades, and using social scientific methods and evidence is more precise than ascertaining whether there is "substantial direct and immediate control" through increasingly complex employment arrangements within the restructured workplace. Thus, the Board's assertion on p. 46686, column 2, paragraph 2, that, "absent a requirement of proof of some 'direct and immediate' control to find a joint-employment relationship, it will be extremely difficult for the board to accurately police a line between independent commercial contractors and genuine joint employers" is incorrect.

8. **Taking no action or expanding the definition of "joint employers" is consistent with existing federal law and rules.**

Finally, the existing *Browning-Ferris* standard as affirmed by the D.C. Circuit, or, in the alternative, the "sufficient market power" test proposed herein, better accords with both administrative law requirements and Executive Order 13,725 because it would simultaneously align with maximizing the benefits and reducing the costs of labor regulation of joint employers while protecting and enhancing competitive labor markets.

Conclusion

The Board's joint-employer NPRM should be withdrawn, or in the alternative, modified to include in its "joint employer" definition indirect employers with market power to determine direct employees' wages and working conditions.

Thank you for the opportunity to comment on this proposed rule.

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